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v.

MOHD NOOR ISMAIL

COURT OF APPEAL, PUTRAJAYA

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GOPAL SRI RAM JCA

RICHARD MALANJUM JCA

HASHIM YUSOFF JCA

[CRIMINAL APPEAL NO. P-05-60-1999]

10 JULY 2005

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CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1) - Trafficking in 15000 grams cannabis - Charge reduced to one of possession under s. 6 based on unsatisfactory chemist's report - Whether trial judge misdirected himself - Leong Bon Huat v. PP*

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EVIDENCE: *Expert evidence - Chemist report - Dangerous drugs - 15000 grams cannabis - Whether weight of samples given to establish nature of drug*

The accused was charged with trafficking 15000 grams of cannabis contrary to s. 39B(1) of the Dangerous Drugs Act 1952 ('the Act'). The trial judge held that trafficking was not made out and so convicted and sentenced the accused on an amended charge of possession under s. 6 of the Act. Hence, the prosecution's appeal.

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Held (affirming the conviction and sentence)

Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) The sole ground on which the court below found no *prima facie* case of trafficking was the unsatisfactory nature of the chemist's evidence. It was clear from the evidence that the chemist did not give weight of the samples he had taken to establish the nature of the drug. In short there was a serious doubt about the weight of the cannabis which had been recovered from the accused. The present case was indistinguishable from *Leong Bon Huat v. PP* and the judge had really no option but to follow it.

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A Bahasa Malaysia *translation of headnotes*

Tertuduh dituduh dengan kesalahan mengedar 15000 gram cannabis di bawah s. 39B(1) Akta Dadah Berbahaya 1952 ('Akta'). Hakim bicara mendapati perbuatan pengedaran tidak dibuktikan dan berikutnya mensabit dan menghukum tertuduh atas pertuduhan terpinda milikan di bawah s. 6 Akta. Ini adalah rayuan pendakwaan terhadap keputusan tersebut.

Diputuskan (mengesahkan sabitan dan hukuman)

C Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

- (1)** Alasan tunggal di atas mana mahkamah di bawah mendapati tiada kes *prima facie* pengedaran dibuktikan adalah keterangan ahli kimia yang tidak memuaskan. Adalah jelas dari keterangan bahawa bagi membuktikan sifat dadah ahli kimia tidak mengemukakan berat sampel yang diambilnya. Ertinya, terdapat keraguan serius berkaitan berapakah berat cannabis yang dijumpai dari tertuduh. Kes semasa tidak berbeza dari kes *Leong Bon Huat v. PP* dan yang arif hakim tidak mempunyai pilihan kecuali mengikuti kes tersebut.

Case(s) referred to:

Leong Bon Huat v. PP [1993] 3 CLJ 603 SC (*fol*)

Legislation referred to:

- F** Dangerous Drugs Act 1952, ss. 6, 39B(1)

For the appellant - Ahmad Fairuz

[Appeal from High Court, Pulau Pinang; Criminal Trial No: 45-8-1998]

- G** *Reported by Usha Thiagarajah*

JUDGMENT

H Gopal Sri Ram JCA:

- I** **[1]** The accused (and that is how we will refer to the respondent in this appeal) was charged with trafficking 15000 grams of cannabis contrary to s. 39B(1) of the Dangerous Drugs Act 1952 ("the Act"). At the close of the prosecution's case the trial judge held that a case of trafficking had not been made out. He amended the charge to one of possession under s. 6 of the

Act. The accused pleaded guilty to that charge. He was convicted and sentenced to a term of five years imprisonment from the date of conviction. The prosecution appealed to us and we dismissed the appeal. Our reasons now follow.

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[2] The sole ground on which the court found no *prima facie* case of trafficking was the unsatisfactory nature of the chemist's evidence. It is clear from the evidence that the chemist did not give the weight of the samples he had taken to establish the nature of the drug. In short there is a serious doubt about the weight of the cannabis which had been recovered from the accused.

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[3] In arriving at his decision the learned judge referred to and applied the judgment of the Supreme Court in *Leong Bon Huat v. PP* [1993] 3 CLJ 603. In that case, the chemist had said this:

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I did not obtain the weight of each sample taken but the total weight of samples taken for analysis was more than 10% of the net weight of 793.85g.

[4] In relation to this evidence Edgar Joseph SCJ who delivered the judgment of the Supreme Court said:

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Now, what does 'more than 10% of the net weight of 793.85g' mean? Does it mean 11% or 12% or 13% or more than that? Not to put too fine a point on it, the expression 'more than 10%' is ambiguous and there should be no ambiguity on such a matter where the life of a subject is at stake. What is necessary is that the testimony of the chemist upon such a matter must be clear and convincing.

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To take the point a little further, if by the expression 'more than 10% of the net weight of 793.85g' means a little more than 10% – and we think, in ordinary parlance, it would not be incorrect to say that it bears such a meaning – then, as a matter of simple arithmetic, the testimony of the chemist, at best, established that the appellant was in possession of a little more than 79.30g of cannabis, which would be well below the statutory minimum of 200g of cannabis required for the operation of the presumption of trafficking under s. 37(da) of the Act.

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It is true that the chemist did say that he had conducted a physical examination of the whole of the plant material, by which, we suppose, he meant a visual examination, aided no doubt by a microscope. But while the result of such an examination might well establish, on the balance of probabilities, that the plant

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- A** material was cannabis within the meaning of s. 2 of the Act it was necessary to take the matter further and establish beyond any reasonable doubt that that was so. This further step would, of necessity, have involved the carrying out of chemical tests on adequate quantities of the plant material. What would be adequate quantities for this purpose would depend on the particular circumstances of each case and we do not consider that any useful purpose would be served by laying down any mathematical formula. Suffice it to say, that in the present case, we were not satisfied that the samples of plant material upon which the chemist had carried out the chemical tests were adequate, having regard to the total weight of the plant material, for the reasons stated.
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- [5]** Before us the learned deputy sought to argue that there was nothing inherently incredible about the chemist's evidence. That argument misses the point. When pressed to show in what manner the trial judge had misdirected himself, he frankly conceded that he could not take his case beyond the grounds set out in the petition of appeal. Those grounds which attack the judge's criticism of the chemist's evidence are really without any merit. At the risk of repetition we would say that the present case is indistinguishable from *Leong Bon Huat* and the judge had really no option but to follow it. The appeal being devoid of merit, was dismissed. Conviction and sentence were affirmed.
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